United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1187

To be argued by
THOMAS H. SEAR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1187

UNITED STATES OF AMERICA,
Appellee,

—v.—

SID COHEN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

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Preliminary Statement

Sid Cohen appeals from a judgment of conviction entered on April 28, 1975 after a four day trial before the Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Indictment 74 Cr. 725, filed on July 19, 1974, charged defendants Sid Cohen, Jesse Phillips, Marvin Gelber and Benny Schwartz, a/k/a "Benny Siegel" in Count One with receiving and having in their possession five cartons of clothing valued at more than $100 which had been unlawfully taken from a motor truck while the cartons were part of an interstate shipment of freight. Title 18, United States Code, Sections 659 and 2. Count Two charged the defendants Marvin Gelber and Benny Schwartz, a/k/a "Benny Siegel" with offering a bribe in order to prevent information being communicated about

a violation of federal law. Title 18, United States Code, Section 1510.*

Prior to trial, Cohen moved to suppress certain post-arrest statements he made to FBI agent Joseph Pistone and Assistant United States Attorney Daniel Beller admitting his involvement in the crime. A hearing was held on March 18, 1975 on that motion, and it was denied.

Trial on Indictment 74 Cr. 725 commenced as to Cohen and Phillips on March 18, 1975 and continued until March 21, 1975, when the jury found Cohen guilty on Count One and Phillips not guilty.

On April 28, 1975 Cohen was sentenced to two years imprisonment, execution of which was suspended, and two years probation.

Statement of Facts

The Government's Case

As of April, 1974, Cohen had worked as a tractor-trailer driver, and Jesse Phillips had worked as a helper, for Shulman Transport Enterprises (Shulman) in Jersey City, New Jersey for about seven years. (Gaboff 16).**

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* Defendants Gelber and Schwartz pleaded guilty to Count One. Count Two was dismissed as to both of them at the time of their sentencing.

** At trial the Government introduced testimony of: Carl Gaboff, Alex Goldberg and Roger McDowell, three employees of Shulman; Lawrence Lief, a private investigator; Marvin Gelber, who received the five cartons; and three agents of the Federal Bureau of Investigation, John Good, Joseph Pistone and William Kelly. Cohen and Phillips both testified on their own behalf.

Citations refer to the trial transcript and indicate the witness whose testimony is being referred to.

In about April, 1973, Cohen met Marvin Gelber, who was a clothing "jobber" and the owner of "Triple Rose Enterprises," located at 305 Seventh Avenue in New York City. (Gelber 166-68). Cohen told Gelber that he had access to unclaimed and damaged freight and agreed to sell Gelber such merchandise in return for 25% of the invoice value of the goods. (Gelber 166, 169). In accordance with this arrangement, Cohen and Phillips delivered merchandise to Gelber on about twelve occasions between April 1973 and April 1974. (Gelber 168-69). Occasionally Gelber would make partial payment for the merchandise upon delivery, but usually Cohen would return later and Gelber would pay him with money obtained from his partner Benny Schwartz. (Gelber 172).

In early 1974 Cohen approached Roger McDowell, who was also a tractor-trailer driver for Shulman as well as an auxiliary police officer. (McDowell 36-38). Cohen told McDowell if "he ever came across any miscellaneous freight like freight that [McDowell] was supposed to deliver, to let Cohen know and he would dispose of it for a profit." (Gelber 38-40).

McDowell initially rejected Cohen's proposal. (McDowell 40). Later, on April 23, 1974, McDowell told the assistant terminal manager of Shulman, Alex Goldberg, and the terminal manager, Carl Gaboff, what Cohen had proposed. (McDowell 41-42). McDowell agreed with Goldberg and Gaboff that he would go along with Cohen's scheme in order to catch him in the act, and the next morning, Goldberg set out five cartons of clothing for McDowell at the New Jersey terminal. (McDowell 43-44; Goldberg 86).* On that morning McDowell loaded the

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* Counsel for both Cohen and Phillips stipulated that the five cartons had a value of more than $100 and were part of an interstate shipment of freight on April 24, 1974. (Tr. 213).

cartons onto his Shulman truck and told Cohen he had some freight. Cohen then told McDowell to take the five cartons from the terminal to 36th Street and Ninth Avenue in New York City, which McDowell did. (McDowell 44-47). When McDowell arrived, he met Cohen and told Cohen to meet him at 45th Street and Lexington Avenue, where McDowell was supposed to unload his truck for a regular delivery. (McDowell 47). Shortly after McDowell arrived at the appointed place, Cohen and Phillips also arrived. McDowell told the two men that the cartons were on the truck and gave them the keys to his truck. (McDowell 47). Cohen and Phillips then unloaded the five cartons, put them into Cohen's Shulman truck, returned McDowell's key, got into Cohen's truck and drove to Madison Avenue and 31st Street in New York City. (McDowell 47-48). McDowell then called Goldberg and told him what had happened. (McDowell 48; Goldberg 86).

At 31st Street and Madison Avenue, while observed by FBI agents and Lawrence Lief, a private investigator working for Shulman, Cohen and Phillips unloaded the five cartons onto a hand truck which Phillips took to the freight entrance of a building located at 305 Seventh Avenue. (Lief 115-120; Pistone 196; Kelly 217). Phillips then took the cartons to the 16th floor of the building and gave them to Gelber. (Gelber 172-73). Gelber, in turn, opened the cartons, removed the names from them, and hung up the garments that were contained inside. (Gelber 173). Phillips then returned to the freight entrance where he was met by Investigator Lief who questioned Phillips and asked him to accompany him to the place where he had taken the cartons. (Lief 120-21). Leif then went to Gelber's office with Phillips and spoke with Gelber who offered Lief $5,000 "to forget about it." (Lief 137). Shortly thereafter, FBI agents arrived, and Phillips, Cohen and Gelber were arrested and taken to FBI headquarters. (Pistone 199; Kelly 220-21; Good 111).

Phillips was interviewed by FBI Agent Kelly and was later interviewed by Assistant United States Attorney Daniel Beller. During both interviews, Phillips said in substance that he had just been doing his job and denied knowing that he was committing a crime or knowing that the cartons were stolen. (Kelly 236, 238). When Cohen was interviewed, he told FBI Agent Pistone and Beller that he had met Gelber approximately six months prior to April, 1974 and that Gelber had offered to pay 25% of whatever price was on the bill of lading for any overfreight he might have. Cohen admitted that he had on several occasions brought freight to Gelber and had been paid 25% of the price on the bill of lading. He further admitted that the five cartons had come from his Shulman truck that day. (Pistone 203-04).

At the end of the Government's case, counsel for defendant Cohen moved to dismiss Count One of the indictment, and that motion was denied. (Tr. 243-44).

The Defense Case

Cohen testified in his own behalf that he had taken the five cartons from McDowell on April 24, 1975 on the East Side of New York and had given them to Phillips to deliver to 305 Seventh Avenue. However, he claimed that he was simply doing a favor for McDowell by making a delivery for to him. (Cohen 251-52). Cohen denied knowing or meeting Gelber prior to their arrest on April 24, 1975. He further claimed that he had signed certain papers at the FBI headquarters and in Assistant United States Attorney Beller's office because he had been threatened with physical harm, because he had taken many Miltown pills that day, because he wanted to find his wife who was running up and down the street, and because he was promised that if he signed the papers he would not have to post bail. (Cohen 265-71).

ARGUMENT

POINT I

The evidence clearly established that Cohen possessed goods unlawfully taken from an interstate shipment of freight.

Cohen was charged with possession of goods worth more than $100 knowing that they had been embezzled, stolen or unlawfully taken or carried away from a motor truck or depot while the goods were a part of an interstate shipment of freight.* Cohen's sole argument on appeal is that he at no time possessed goods which had

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* The indictment herein, in pertinent part, reads as follows: "The defendants unlawfully, wilfully and knowingly did receive and have in their possession goods and chattels of a value more than $100, to wit, five cartons of wearing apparrel, knowing said goods and chattels to have been embezzled, stolen and unlawfully carried away from a motor truck, vehicle, storage facility, platform and depot while said goods and chattels were moving and were part of and constituted an interstate shipment of freight, express or other property."

That charge alleges a violation arising under the second or "possession" paragraph of 18 U.S.C. § 659, which reads:

> "Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen [commits a crime];"

The words "any such goods or chattels" refers back to the first paragraph of that section, which provides:

> "Whoever embezzles, steals or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any . . . motortruck, or other vehicle . . . with intent to convert to his own use any goods or chattels [which are part of interstate commerce (commits a crime)];"

Accordingly, "any such goods" in the second paragraph refers to any goods which are stolen, embezzled, or unlawfully taken or carried away.

been stolen or unlawfully carried away, since McDowell had been in lawful possession of the five cartons that Cohen took from McDowell's truck. This claim is utterly devoid of merit.

The record establishes that Cohen unlawfully took, carried away and stole the five cartons when he removed them from McDowell's truck and loaded them into his truck.* While there can be no question that McDowell had lawful possession of the cartons and legal authority from Shulman to make the cartons available to Cohen, Cohen took the cartons from McDowell's truck without any right or authority to do so. For while McDowell, with the knowledge and approval of Shulman officials, pretended to go along with Cohen, he in no way purported to give Cohen lawful title to the goods. Moreover, Cohen certainly knew that the lawful possessor of the cartons was Shulman, and that, in removing the cartons from McDowell's truck, he was stealing them and unlawfully taking and carrying them away. Accordingly, when Cohen drove away with the cartons in his truck to deliver them to his fence Gelber, he was in obvious possession of goods which he knew had been stolen and unlawfully taken and carried away within the meaning of the second paragraph of 18 U.S.C. § 659.**

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* Since Phillips was found not guilty by the jury he must be considered to have acted as Cohen's innocent agent when he helped Cohen take the cartons from McDowell and deliver them to Gelber.

** The fact that Cohen was charged only with *possession* of unlawfully taken goods knowing them to have been unlawfully taken and not with having stolen the goods and unlawfully carried them away is of no significance. The Government could have charged Cohen with either or both offenses, and it is well-settled that one who steals goods from an interstate shipment of freight may be charged with, and convicted of, unlawful possession of

[Footnote continued on following page]

The reasoning of the Third Circuit's *en banc* decision in *United States* v. *Bryan*, 483 F.2d 88 (3rd Cir. 1973) is on all fours with the situation in this case. In *Bryan*, one defendant, Echols, was charged under 18 U.S.C. § 659 with stealing cases of whiskey from a pier, and Bryan, a terminal manager of a freight line, was charged with aiding and abetting Echols. The whiskey was at the pier in the possession of U.S. Lines, a shipping company, and consigned to a liquor control board. The consignee sent authorization for picking up the goods and a bill of lading to Bryan's freight company, and Bryan obtained the documents. Echols showed up at the pier with the documents driving a truck disguised as belonging to Bryan's freight company. U.S. Lines suspected a possible theft, contacted the freight company about the pick up and was told nothing was known about it. U.S. Lines then contacted the FBI and was told to release the whiskey to Echols, which it did. The trial court, hearing the case without a jury, found Echols to be an innocent dupe and not guilty, but found Bryan guilty of having unlawfully taken the whiskey through his agent Echols.

The Third Circuit considered and rejected Bryan's argument that no unlawful taking had occurred because the shipping company consented to Echols' taking the whiskey. The court held, 483 F.2d at 91:

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those same goods. *United States* v. *Sharpe*, 452 F.2d 1117 (1st Cir. 1971); *United States* v. *Cusumano*, 429 F.2d 378 (2d Cir.), *cert. denied*, 400 U.S. 830 (1970); *United States* v. *Jackson*, 422 F.2d 975 (6th Cir. 1970); *D'Argento* v. *United States*, 353 F.2d 327 (9th Cir. 1965), *cert. denied*, 384 U.S. 963 (1966); *Robinson* v. *United States*, 333 F.2d 323 (8th Cir. 1964); *United States* v. *Cordo*, 186 F.2d 144 (2d Cir.), *cert. denied*, 340 U.S. 952 (1951); *Carroll* v. *Sanford*, 167 F.2d 878 (5th Cir. 1948); *United States* v. *Dunbar*, 149 F.2d 151 (7th Cir.), *cert. denied*, 325 U.S. 889 (1945).

"The crime of stealing under 18 U.S.C. § 659 has been given a broad construction, free from the technical requirements of common law larceny. United States v. DeNormand, 149 F.2d 622, 624 (2d Cir. 1945).[1] A trial court instruction that the jury need only find "an unlawful taking of the goods by the defendants" was found sufficient in *DeNormand*. The consent to the removal of the goods by U.S. Lines personnel in this case does not demonstrate the absence of an unlawful taking. In reviewing the record to determine if there was an unlawful taking, the relevant question involves not the state of mind of personnel of U.S. Lines but rather the state of mind of defendants.

We therefore find no difficulty in reconciling our conclusion that a crime was committed here with the statements in United States v. Cohen, 274 F. 596, 597 (3d Cir. 1921):

> To constitute "stealing" there must be an unful taking . . . with intent to convert to the use of the taker and permanently deprive the owner.

and in Vaughn v. United States, 272 F. 451, 452 (9th Cir. 1921), that in a case of larceny the corpus delicti consists of two elements:

> First, that the property was lost by the owner; and second, that it was lost by a felonious taking.

Both formulations of the elements of stealing concentrate on the state of mind of the criminal, not upon that of the possessor of the goods taken. In cases where the lawful possessor indicated to the taker that permission was granted to the taking, a finding of commission of a crime would be un-

likely. That, however, is not the case sub judice. There is no proof that U.S. Lines led defendants to believe they had permission to take the goods.

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[1] The crime detailed in U.S.C. § 659 is therefore different from that detailed in 18 U.S.C. § 2113(b), stealing from a bank. The latter statute describes common law larceny and thus requires a "trespassory taking", a taking without consent. Bennett v. United States, 399 F.2d 740, 742 (9th Cir. 1968). While conviction for violation of 18 U.S.C. § 2113(b) would be impossible under the consensual circumstances found in the present case, the limitations of the common law do not prevent conviction violation of 18 U.S.C. § 659. *See also* United States v. Patton, 120 F.2d 73 (3d Cir. 1941)."

The Third Circuit went on to explain why the very same cases relied upon by Cohen in his brief on this appeal did not render the taking by Bryan lawful.

> "The present factual framework differs considerably from those cases suggested by appellant wherein the legal principal apposite is that 'when stolen goods are no longer to be considered stolen, and the purchaser cannot be convicted of receiving stolen goods.' United States v. Cawley, 255 F.2d 338, 340 (3d Cir. 1958); *see also* United States v. Fusco, 398 F.2d 32 (7th Cir. 1968). The factual situations in those cases involved a theft followed by sale of the stolen goods to a third party. In *Cawley*, the possessor of the goods retrieved them before they were sold. The court held the goods could not be considered stolen after their recovery when the takers were given permission to continue with their original plan to sell them to a third party. This legal principle, adhered to by this court since United States v. Cohen, 274 F. 596, 599 (3d Cir. 1921), is based on the legal definition of stolen property, and on fears that buyers of

> stolen property may be entrapped. No similar definitional problems or fears are involved in the present case. Unlike *Cawley*, this case discloses no encouragement of the defendants to conduct the crime. When the goods were taken from the U.S. Lines platform, they became stolen goods; they did not lose that characterization prior to completion of the offense." 483 F.2d at 91-92.*

Cohen seeks to distinguish *Bryan* on the ground that Echols was given the whiskey as agent of the consignee, not individually, and therefore took it under false pretenses. However, that difference has no meaning with respect to Cohen's claim that his taking was lawful because Shulman authorized McDowell to give Cohen the freight. In *Bryan*, U.S. Lines suspected that Echol's representations were not true and was not fooled by the false pretenses. Nevertheless, U.S. Lines consented to the taking by Echols in the sense that it gave him the whiskey. However, it did not pass lawful title to him individually or the right to do anything with the whiskey other than deliver it to the consignee. In this case,

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* In addition to the reasons noted in *Bryan*, the decisions in *United States* v. *Cohen*, 274 F. 596 (3d Cir. 1921) and *United States* v. *Cawley*, 255 F.2d 338 (3d Cir. 1958) are factually distinguishable from the circumstances in this case. In *Cohen*, a case involving an alleged violation of 18 U.S.C. § 659, the court made it clear that the defendant never obtained independent control or possession of the goods. 274 F. at 598. In short, there was no unlawful *taking* of the goods by the defendant.

Cawley involved an alleged violation of 18 U.S.C. § 1708, and the defendant was charged with buying and possessing packages that had been stolen from the mail. The packages had been stolen, but were recovered by postal inspectors and later sold to defendant. The defendant's conviction was reversed, not on the grounds that the defendant lawfully took and obtained possession of the packages, but because, when he obtained them, they were obviously no longer stolen *from the mail.*

Shulman suspected that, when presented with the opportunity to take the cartons, Cohen would do so and simply instructed McDowell to go along with him. In that sense, Shulman consented to the taking by Cohen. However, that consent was precisely the same type of limited consent that existed in *Bryan*. Shulman did not give McDowell title to the goods and did not authorize McDowell to give Cohen title to the goods or the right to sell the goods to another. Nor did McDowell in anyway indicate to Cohen that Shulman had authorized him to transfer lawful possession and title to the cartons. In both cases there was an unlawful taking.

This case is no different from those situations in which one party, suspecting that another party is planning a theft, merely places property in a position where it can easily be taken. The fact that the lawful possessor then "allows" the thief to take the goods does not mean that there is not a theft or unlawful taking within the terms of 18 U.S.C. § 659. See *United States* v. *DeRocco*, 320 F.2d 58 (6th Cir. 1963).

Also, the mere fact that an agent of the lawful possessor or a law enforcement official pretends to go along with the theft and provides some assistance to the person taking the goods does not mean that there is no theft within the meaning of the statute. In *Singer* v. *United States*, 208 F.2d 477 (6th Cir. 1953), the defendant Singer and two others, Stewart and Kaye, conspired to steal and sell a load of steel. Prior to the theft, however, Stewart told the FBI about the scheme. Stewart was instructed to go along with the plan and did so. In fact, Stewart personally picked up the load of steel of which Singer later took possession. Singer claimed, among other things, that there had been no theft, but the Sixth Circuit Court of Appeals affirmed Singer's conviction on both a con-

spiracy charge and a substantive count of possession under 18 U.S.C. § 659.*

No court in any case in which the facts were even remotely similar to the facts of this case has held that the taking was not an "unlawful taking" within the meaning of 18 U.S.C. § 659, and there are simply no policy reasons why this Court should reject the plain meaning of the statute and hold that what Cohen did was lawful. The legislative objective of 18 U.S.C. § 659 is to punish those unlawful takings of goods which interfere with the free flow of interstate commerce, and it has been recognized that the statute is to be broadly construed to achieve that end. *United States* v. *DeNormand*, 149 F.2d 622, 624 (2d Cir.), *cert. denied*, 326 U.S. 756 (1945). Here, Cohen's actions plainly interfered with interstate commerce. As the evidence in this case clearly showed, Cohen had been stealing interstate freight from Shulman, and selling it, for many months prior to April, 1974. On April 24, 1974, McDowell brought the cartons to New York in accordance with the specific instructions of Cohen, and Cohen, knowing full well that he had no right to the freight, took the cartons from McDowell's truck to sell them to his fence Gelber.

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* As already noted, the Court in *Bryan* emphasized that, while some forms of consent preclude a finding of common law larceny because of the requirement of a trespass, the requirements of common law larceny do not apply to 18 U.S.C. § 659. 483 F.2d at 91 n.1. However, in several cases even common law larceny has been found where the lawful possessor provided an opportunity for another to steal his goods and where an agent of the lawful possessor pretended to go along with, and in fact participated in, the theft. *E.g.*, *State* v. *Pacheco*, 13 Utah 2d 148, 369 P. 2d 494 (1962); *State* v. *Snider*, 111 Mont. 310, 111 P. 2d 1047 (1940); *Carnes* v. *State*, 134 Tex. Crim. 8, 113 S.W. 2d 542 (Ct. Crim. App. 1938); *Jarrott* v. *State*, 108 Tex. Crim. 427, 1 S.W. 2d 619 (Ct. Crim. App. 1927); *Commonwealth* v. *Dougherty*, 18 Pa. Dist. 857, 37 Pa. Co. 62 (1909); *People* v. *Hanselman*, 76 Cal. 460, 18 P. 425 (1888); *Connor* v. *State*, 24 Tex. App. 245, 6 S.W. 138 (1887).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

THOMAS H. SEAR being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 8th day of October, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

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And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of ~~Manhattan~~, City of New York.

Thomas H. Sear.

Sworn to before me this

8TH day of October, 1975

Maria A. Morales
COUNTY OF NEW YORK
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